No. 43215-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS MILLER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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II. STATEMENT OF THE CASE

On July 25, 2010 Aubrey Cole, owner and operator of Bigfoot Trucking, parked his 53 foot 1987 Great Dane trailer at the Great Wall Restaurant in Silver Creek. 1RP 64; 2RP 52.[1] Mr. Cole parked the trailer at Great Wall because his residence is about three miles from Great Wall and due to the length of the trailer it is difficult for Mr. Cole to get it parked at his residence. 1RP 65. The trailer was parked at the edge of a field and it was not blocking any entrances or parking spots. 1RP 65; 2RP 105. Mr. Cole received permission from someone working inside Great Wall to leave the trailer parked. 1RP 78. Mr. Cole wrote down his number on the back of a Great Wall business card and told the man to call him if there were any problems. 1RP 66. Mr. Cole was unaware of any

[1] There are three verbatim report of proceedings for the jury trial in this case. Day one, January 26, 2012, will be cited as 1RP; day two, January 27, 2012 and the sentencing hearing, will be cited as 2RP; volume II of day two will be 3RP (different court reporter).

issue with him parking his trailer at Great Wall until he received documents in the mail from Miller. 1RP 66-67. Miller sent Mr. Cole forms to sign over the trailer due to it being abandoned. 1RP 66. Mr. Cole had never met Miller. 1RP 66.

Miller worked for Peking House, Inc., which does business as Great Wall. 1RP 98; 2RP 53-54. At the time Miller was the secretary for the corporation and a registered agent. 1RP 98; 2RP 53-54. Miller knew the owners of Peking House, as they had been friends for many years, and due to their difficulty with the English language worked for them to aid them in the various transactions and business needs. 2RP 43, 52-54. Miller noticed the trailer and felt it had been parked illegally, without permission. 2RP 53. Mr. Wu, the owner of Great Wall, did not give permission to anyone to park the trailer on the property. 2RP 42-43. In July 2010 there were six to seven employees working at Great Wall. 2RP 45.

Miller decided to take action regarding the trailer, independent from Peking House, Inc. 1RP 94; Ex. 4. Miller called the Lewis County Sheriff's Office regarding the trailer. 1RP 48. Deputy McKnight contacted Miller over the phone on September 23, 2010 around 1:00 p.m. 1RP 48. Miller explained there was a trailer on his property that he wanted removed. 1RP 49. Deputy

McKnight explained that this was a civil matter and he would need to contact a tow company and have the trailer civilly impounded. 1RP 49. Deputy McKnight also provided Miller with the registered owner's contact information after Miller provided Deputy McKnight with the license plate from the trailer. 1RP 49. Deputy McKnight told Miller that the registered owner was Bigfoot Trucking and there was a Mr. Cole listed on the registration. 1RP 49-501. Deputy McKnight gave Miller the address listed on the registration. 1RP 49-50.[2]

Miller sent Mr. Cole two different letters or documents in the mail. 1RP 67-68; 2RP 63. Miller sent Mr. Cole a copy of an affidavit for loss title, the release of interest for the trailer and a note asking Mr. Cole to contact him. 2RP 63. On October 4, 2010 Miller sent Mr. Cole the documents again but this time by certified mail. 2RP 63-64. The documents Mr. Cole received did not ask him to remove the trailer, they only asked him to sign it over. 1RP 68. Mr. Cole immediately called Miller after receiving the documents. 1RP 67-68. On October 9, 2010 Mr. Cole called and left a voicemail for Miller, indicating he received the letter.[3] 2RP 7-8; Ex. 8.[4]

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[2] Miller denied that Deputy McKnight had given him Mr. Cole's information. 2RP 56.

[3] The trial court gave a limiting instruction regarding the voicemail that the content must not be considered, that it must only be considered regarding Miller's state of mind.

[4] The State will be filing a supplemental designation of Clerk's papers to include Exhibits 8 and 9.

Mr. Cole had attempted to retrieve the trailer on multiple occasions but it had been blocked in by a van Miller had parked in front of the trailer. 1RP 69-70. Mr. Cole met with Miller in the parking lot by the trailer. 1RP 71; 2RP 68. Miller demanded Mr. Cole pay him 200 dollars prior to the removal of the trailer. 1RP 71. Mr. Cole told Miller he would be willing to pay 100 dollars. 1RP 71. Mr. Cole arranged with Miller to come back the next day with the 100 dollars and pick up the trailer. 1RP 71.[5] When Mr. Cole returned the next day with his truck and the money, the trailer was gone. 1RP 71. Miller had removed the trailer to hold it "hostage" and protect his "interest". 1RP 100-01; 2RP 38, 82-83; Ex. 9.[6] The trailer was parked behind a locked gate at a storage facility across the street from Great Wall. 1RP 72; 2RP 109. Mr. Cole attempted several times to get his trailer back from Miller. 1RP 72-77. Mr. Cole asked a friend to help him and even had an attorney write a letter to Miller. 1RP 73-74. Mr. Cole never told Miller that Miller could have the trailer; in fact, Mr. Cole told Miller that he wanted his trailer back. 1RP 74-75. Mr. Cole reported the trailer as stolen on October 13, 2010. 2RP 19.

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[5] Miller denied asking Mr. Cole for 200 dollars and insisted it was Mr. Cole who offered the money as a way to set things right. 2RP 70-71.

[6] Exhibit 9 at seven minutes and 44 seconds (7:44).

On October 26, 2010 Miller went to the Department of Licensing (DOL) and filled out the necessary documents to attempt to establish ownership of the trailer. Ex. 4. Miller signed a Three-Year Registration Without Title Affidavit which stated, "Trailer was left on my property, attempted to get ahold of owner of record by certified mail with return receipt with no reply." Ex. 4. Miller was given a Vehicle Title Application / Registration Certificate that listed Thomas E. Miller as the registered owner of the trailer. Ex. 4. The comment in the document stated "no title issued – ownership in doubt – color-white" and was dated October 26, 2010. Ex. 4.

Miller approached Chuck Norris towards the end of October 2010 at the yard Mr. Norris was working at in Chehalis. 1RP 27-28. Miller asked Mr. Norris if he would be interested in buying a trailer that was in Miller's possession. 1RP 28. Norris eventually made arrangements to buy the trailer from Miller for $1000. 1RP 30-31. Miller never told Mr. Norris that anyone other than himself had an ownership interest in the trailer. 1RP 33. Mr. Norris found out there was a dispute regarding ownership when a deputy or detective from the Lewis County Sheriff's Office contacted him on the phone between four and six days after Mr. Norris purchased the trailer. 1RP 34-35. Mr. Norris had already sent the trailer down to

California. 1RP 35. Mr. Norris made arrangement to have the trailer shipped back to Washington and Mr. Cole was able to pick up the trailer from the yard in Chehalis. 1RP 36. Mr. Norris asked Miller for his money back but Miller refused to return the money. 2RP 107-08.

The State charged Miller by Second Amended Information with Count I, Theft in the Second Degree and Count II, Certificate of Ownership False Statement or Illegal Transfer. CP 1-2. Miller was found guilty of both counts after a jury trial. 3RP 53-55. Miller timely appeals his conviction. CP 15-25.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE MILLER'S PUBLIC TRIAL RIGHT BY DISCUSSING JURY INSTRUCTIONS PRELIMINARILY IN CHAMBERS.

The right to a public trial was not violated when the deputy prosecutor, the judge and Miller's trial counsel preliminarily discussed jury instructions in chambers.

1. Standard Of Review.

Whether a trial court has violated the public trial right is a question of law and reviewed de novo. *State v. Momah,* 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

2. Preliminarily Discussing Proposed Jury Instructions In Chambers Does Not Violate Any Of The Values Served By The Public Trial Right.

The United States Constitution and the Washington State Constitution guarantees that a criminal defendant has the right to a public trial. U.S. Const. amend. IV; Const. art. I, § 22. The Washington State Constitution also requires that "[j]ustice in all cases shall be administered openly and without undue delay." Const. art. I, § 10. A court must weigh the five *Bone-Club* factors prior to closing a courtroom in a criminal hearing or trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The five *Bone-Club* factors are:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a "serious imminent threat" to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d at 258-59. A criminal defendant's public trial rights are violated if there is a proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.2d 150 (2005).

The public trial requirement is primarily for the benefit of the accused. *Momah*, 167 Wn.2d at 148. "[T]he right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Sublett,* Supreme Court No. 8456-4, slip at 14 (November 21, 2012). The right to a public trial is closely linked to the defendant's right to be present during critical phases of the trial. *State v. Sadler,* 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations omitted).

The Supreme Court recently adopted the use of the experience and logic test to determine if a public trial right violation occurred. *Sublett,* slip at 14-21. The Supreme Court adopted this

rule, formulated by the United States Supreme Court, "to determine whether the core values of the public trial rights are implicated." *Id.* at 15.

> The first part of the test, the experience prong, asks whether the place and process have historically been open to the press and general public. The logic prong asks 'whether public access plays a significant role in the functioning of the particular process in question. If the answer to both is yes, the public trial attaches and the *Waller* or *Bone-Club* factors must be considered before the proceeding may be closed to the public.

Id. at 15 (internal quotations omitted), *citing Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-8, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986).[7] The reviewing court is also required to "consider whether openness will enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 17 (citations and internal quotations omitted).

In *Sublett* the Supreme Court had to decide whether the right to a public trial was violated when the trial court answered a jury question in chambers with only the judge, deputy prosecutor and defense counsel present. *Id.* at 11. The Court employed the experience and logic test to determine if a violation had occurred. *Id.* at 18-21. The Court examined if jury questions regarding jury instructions had historically been open to the general public. *Id.* at

[7] *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

18-19.[8] The Court analyzed this question by looking at proceedings for jury instructions in general. *Id.* at 18. The Court discussed that jury instruction proceedings have not historically been required to be conducted in an open courtroom. *Id.* at 18. The Court considered the Criminal Rules and how the jury instructions must be submitted in writing and objections and exceptions must be placed on the record. *Id.* At 18-19. The Court concluded that historically, it could not find a challenge to the criminal rules regarding jury instructions or any case that required jury instruction discussions to be held in open court. *Id.* at 19. The Court held that the public trial right was not implicated by the answering of the jury question in chambers. *Id.* at 20-21. The Court further explained:

> None of the values served by public trial right is violated under the facts of this case. No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists. The appearance of fairness is satisfied by having the questions, answer, and any objections placed on the record pursuant to CrR 6.15. Similarly, the requirement that the answer be in writing serves to remind the prosecutor and judge of their responsibility because the writing will be become part of the public record and subject to public scrutiny and appellate review. This is not a proceeding so similar to the trial itself that the same rights attach,

[8] The Court also noted that Sublett and Olsen had not identified any case that a reviewing court has held that answering a jury question regarding the jury instructions in chambers violates the public trial right. Similarly in this case, Miller has not identified a case that holds a jury instructions conference held in chambers violates the public trial right.

> such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.

Id. at 21.

In the present case the State could find one statement by the trial court regarding an in-chambers conference or discussion. 1RP 22. The trial court stated the following the first day of trial, prior to voir dire:

> The statute we were talking about in chambers pretrial, with respect to what a person is obligated to do, with respect to abandoned or found property, the entire chapter is RCW 63.21.010 and that's for the benefit of both the defense and prosecution.

1RP 22. The deputy prosecutor responded that he neglected to put in a particular jury instruction regarding actual and constructive possession and he also anticipated drafting an instruction regarding abandoned property. 1RP 22. The trial court responded by telling counsel they might want to read the statute "because there may be some gems in there that are beneficial to either or both sides." 1RP 22. The state could find no other mention of an in-chambers conference. *See* 1RP, 2RP, 3RP.

The second day of trial, prior to reading the court's instructions to the jury, the trial court asked if either party had exceptions or objections to the instructions given or not given. 3RP

3. Miller's trial counsel objected on the record to Instruction 19. 3RP 3. Instruction 19 was the instruction regarding abandoned property and how to properly claim it pursuant to RCW 63.21.010, RCW 63.21.020, RCW 63.21.030 and RCW 63.21.040. CP 50. Miller's trial counsel argued that the instruction was not proper. 3RP 3-4. The trial court stated it was "surprised and taken a back" by Miller's counsel exception to Instruction 19. 2RP 4. Miller's trial counsel explained, "...on that particular exception, it was with extensive discussion with my client is the basis for the objection. So interpretation of found property seems to be the issue." 3RP 5.

The Supreme Court's reasoning in *Sublett* is directly on point for this case. The Supreme Court discussed jury instruction conferences and how historically they were not necessarily done on the record in open court. *Sublett* at 18. When evaluating the experience portion of the test, a pretrial discussion regarding jury instructions that happens in the judge's chambers, is not a process that has historically been open to the general public or the press. The State could only find one Washington State case regarding in-chambers conferences for jury instructions and public trial right, a Division II case from earlier this year, which held there is not a per se rule that issues discussed during an in-chambers conference is

not subject to the public trial right. *State v. Bennett*, 168 Wn. App. 197, 205, 275 P.3d 1224 (2012). In that opinion the court stated that some in-chambers conferences for jury instructions may be purely administrative or ministerial and others could be adversarial and in order to have an effective review on such issues the parties should make an adequate record regarding what occurred during the in-chambers conference. *Bennett,* 168 Wn. App. at 206. The holding in *Bennett* does not require that a jury instruction conference be held in open court. In a historical context, a jury instruction conference is not a proceeding that implicates the public trial right.

In regards to logic, a discussion regarding possible and proposed jury instructions in-chambers does not violate the core values served by the public trial right. *Sublett* at 21. There are no witnesses to be called to testify, no testimony given and therefore no possible perjury. *Id.* The objections and exceptions that are put on the record hold the prosecutor and the judge responsible for their actions. *See Id.* Finally, "[t]his is not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence." *Id.* The in-

chambers conference in this case, where apparently there were preliminary discussions regarding jury instructions, did not violate Miller's public trial right.

B. THE TRIAL COURT DID NOT VIOLATE MILLER'S RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF THE PROCEEDINGS.

Miller's right to be present was not violated when the trial court, the deputy prosecutor and Miller's trial counsel had an in-chambers pretrial conference where the parties preliminarily discussed jury instructions.

1. Standard Of Review.

Whether a trial court has violated a defendant's right to be present is a question of law and reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

2. Preliminarily Discussing Proposed Jury Instructions In Chambers Does Not Violate Any Of The Values Served By The Public Trial Right.

The United States Constitution and the Washington State Constitution guarantees that a criminal defendant has the right to be present during all critical stages of the proceedings. U.S. Const. amend.VI and XIV; Const. art. I, § 22; *State v. Irby*, 170 Wn.2d 874, 879, 246 P.3d 796 (2011), *citing Rushen v. Spain*, 464 U.S. 114, 117, S. Ct. 453, 78 L. Ed.2d 867 (1983). Beyond the right to be

present during the presentation of evidence, a criminal defendant also "has the right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (internal quotations and citations omitted). The right to be present does not extend to in-chambers conferences between the attorneys and the court on legal matter. *Lord*, 123 Wn.2d at 306. Legal matters include the wording of jury instructions. *In re Pirtle*, 136 Wn.2d 467, 484, 965 P.3d 593 (1998).

In this case, the only mention of an in-chambers conference was on the first day of trial when the trial court stated that as it was suggested during the in-chambers pretrial conference both parties should look closely at RCW 63.21.010. 1RP 22. There is nothing in the record to suggest that anything substantive regarding disputed facts was discussed. Further, the actual argument and objection to Jury Instruction 19 was on the record. 3RP 3-4; CP 50. In his argument, Miller's trial counsel explained to the trial court that part of the reason he was objecting to the jury instruction was because of a conversation he had with Miller regarding the instruction and their theory of the case. 3 RP 5.

The trial court did not violate Miller's constitutional right to be present. The in-chambers pretrial conference was regarding legal matters. The record reflects that Miller did have an opportunity to discuss the proposed jury instructions with his trial counsel and objections to Instruction 19 were placed on the record. This Court should affirm Miller's convictions.

C. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN THOMAS'S CONVICTION FOR CERTIFICATE OF OWNERSHIP FALSE STATEMENT OR ILLEGAL TRANSFER.

The State presented sufficient evidence to sustain Miller's court's conviction for Certificate of Ownership False Statement or Illegal transfer. The evidence introduced proved that Miller knowingly made a false statement of a material fact in his application for the certificate of ownership of a vehicle.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. There Was Sufficient Evidence Presented To Prove Miller Made The False Statement When He Applied For The Certificate Of Ownership Of The Trailer.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L. Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850

(1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

Miller was charged by the State with Certificate of Ownership False Statement or Illegal Transfer pursuant to RCW 46.12.210.[9] CP 1-2. The statute states: [a]ny person who knowingly makes any false statement of material fact, either in his or her application for the certificate of ownership or in any assignment thereof…is guilty of a class B felony."[10] RCW 46.12.210. Miller argues to this Court that the Bonded Title or Three-Year Registration Without Title Affidavit is not an application for certificate of ownership and therefore the misstatement contained within the document is not sufficient to sustain the conviction for Certificate of Ownership False Statement or Illegal Transfer. Brief of Appellant 13-14; Ex. 4. The Three-Year Registration Without Title Affidavit is an application for a certificate of ownership and the evidence presented was sufficient to sustain the conviction.

[9] Any citations to RCW 46.12.210 will be to the 2010 version of the statute.
[10] There are three alternative means of committing the offense and the jury only found Miller guilty of this prong.

The Department of Licensing (DOL) may not issue or furnish a certificate of license registration "unless the applicant, at the same time, makes satisfactory application for a certificate of ownership or presents satisfactory evidence that such a certificate of ownership covering the vehicle has been previously issued." RCW 46.12.020. [11] A person who takes possession of an abandoned vehicle[12] has no choice but to apply for a three-year registration without title because DOL will not issue a certificate of ownership if there is not satisfactory evidence of ownership. RCW 46.12.151.[13] The Three-year Registration Without Title Affidavit is part of the process a person must go through to obtain a certificate of ownership of an abandoned vehicle. RCW 46.12.151. The certificate of ownership cannot issue to the person claiming the abandoned vehicle prior to the expiration of the three-year period required by DOL RCW 46.12.151.

The only mechanism available for Miller to obtain a certificate of ownership of the trailer was to submit the Three-Year Registration Without Title Affidavit. RCW 46.12.151. While Miller would not be issued the certificate of ownership until the end of the

[11] Former RCW 46.12.020 as it was codified in 2010.
[12] The State does not believe Mr. Cole's trailer was abandoned but by claiming it was abandoned Miller was allowed to start the ownership certificate application process.
[13] As it was codified in 2010.

three year wait period, the affidavit is an essential part of Miller's application for the certificate of ownership of the trailer. Therefore, any statements made on the Three-Year Registration Without Title Affidavit are statements in one's application for the certificate of ownership of a vehicle.

The State presented sufficient evidence that Miller was attempting to obtain the certificate of ownership of the trailer under the pretense that it had been left abandoned on his property. 1RP 94; Ex. 4, 9. The application process required Miller to submit a Three-Year Registration Without Title Affidavit, which he did. Ex. 4. This Court should hold that the State presented sufficient evidence that Miller committed the crime of Certificate of Ownership False Statement or Illegal Transfer.

3. The State Presented Sufficient Evidence To Prove The Statement Made By Miller Was False.

The State is required to prove that a material statement on the application for certificate of ownership was false. RCW 46.12.210. The State's allegation in this case was that Miller falsely stated on the affidavit that he received no reply to certified mail he sent the owner of record of the trailer. 3RP 29-30. Miller argues that he did not provide a false statement because Mr. Cole never

replied to the certified letter in writing, only by phone and in person. Brief of Appellant 14-15.

Reply means: "to respond in words or writing…to do something in response." Webster's Third New International Dictionary, 1925. This is the common meaning of the term reply. Not only did Mr. Cole reply to Miller by calling Miller after receiving the letter, the two men also met in person to discuss the matter. 1RP 71; 2RP 7-8, 68. Miller knew Mr. Cole had replied to his certified letter but without falsely stating he had not received a reply to his certified letter sent to the owner of record Miller could not get the ownership documents from DOL. Any rational jury could have found that Miller made a false statement of a material fact, that he had not received a reply, in his application for the certificate of ownership. This Court should affirm Miller's conviction on Count II, Certificate of Ownership False Statement or Illegal Transfer.

D. JURY INSTRUCTION 19 DOES NOT CONSTITUTE A JUDICIAL COMMENT ON THE EVIDENCE.

Jury instruction 19, the statutory means by which a person may lawfully claim found property, was not an improper judicial comment on the evidence. The instruction properly stated the law and there was sufficient evidence presented that, at least initially, Miller believed the trailer to be abandoned.

1. Standard Of Review.

Constitutional violations are reviewed de novo. *Irby*, 170 Wn.2d at 880. Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Id.*

2. The Trial Court Did Not Impermissibly Comment On The Evidence.

A judge is prohibited from instructing a jury in regards to a matter of fact. Const. art. IV § 16. A claim that the judge impermissibly commented on the evidence may be raised for the first time on appeal. *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). A statement is considered a comment on the evidence when the judge's "attitude towards the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). When determining if the trial judge's remark constitutes a comment on the evidence the "reviewing court's evaluate the facts and circumstances of the case." *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). If a trial court's statement is deemed to be a comment on the evidence then it is presumed to be prejudicial. *Lane,* 125 Wn.2d at 838. The State has the burden of

showing the defendant was not prejudiced by the judge's comment unless the record affirmatively reflects that no prejudice resulted. *Id.* A judge's comment on evidence, unless deemed harmless, is reversible error. *Id.* at 393.

A jury instruction can be an impermissible comment on the evidence. *Levy* 156 Wn.2d at 721-23. The trial court's personal beliefs or feelings regarding an element of the charged offense do not need to be expressly conveyed to the jury. *Id.* at 721. It is sufficient for a comment to merely imply the trial court's personal feelings. *Id.* "Thus, any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as a judicial comment." *Id.*

In *Levy* the trial court included impermissible statements in the jury instructions, such as calling a crowbar a deadly weapon and referring to an apartment as a building. *Levy* 156 Wn.2d at 716-17, 721-22. These facts were inserted in the "to wit" of the jury instructions of the to convict instruction for burglary and the instruction regarding possession of a deadly weapon for the sentencing enhancement. *Id.* The Supreme Court held that the reference to the residence as a "building improperly suggested to the jury that apartment was a building as a matter of law." *Id.* at

721. The Court also found that by calling the crowbar a deadly weapon it relieved the State of its obligation of proving that the use of the crowbar qualified it as a deadly weapon. *Id.* at 722.

In the present case the trial court gave an instruction regarding the proper procedure, as set forth in RCW chapter 63.21, for claiming found properly lawfully. RCW 63.21.010; RCW 63.21.020; RCW 63.21.030; RCW 63.21.040; CP 50. This instruction correctly stated the law regarding the lawful procedure for claiming found personal property. *Id.* Instruction 19 did not improperly imply that the trial court believed Miller did not follow the proper procedures for acquiring found property, thereby making him guilty of theft. The instruction allowed the State to argue that Miller had not followed the correct procedure to claim found property, which the State could then argue that Miller did not have a legal right to property. *See* 3RP 31. This argument is to rebut Miller's assertions that he was just doing what DOL allowed him to do and he rightfully registered the trailer in his name.

The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin,* 100 Wn.2d 417, 420, 670 P.2d 265 (1983). A proposed instruction should be

given by the trial court if it is not misleading, properly states the law and allows the party to argue her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State v. Redmond,* 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). "When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party." *Webb*, 162 Wn. App. at 2008, *citing State v. Hanson,* 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990).

The instruction was not misleading as it correctly stated the law. The instruction was supported by the testimony of Deputy McKnight and Detective Borden. Deputy McKnight had to give Miller the information regarding the owner of the trailer because Miller did not know who owned the trailer. 1RP 49-50. Miller told Detective Borden repeatedly that the trailer had been abandoned on his property. 1RP 94. Miller's own testimony furthered the assertion that the trailer had been abandoned on the property because he was attempting to locate the owner through various means, including the Sheriff's Office, DOL and even a friend who was a truck driver. 2RP 54-62. Miller's defense inferred that he had the right to register the trailer because there was a DOL process for

registering vehicles without a clear title. Instruction 19 allowed the State to argue that Miller did not have the right to the property because he did not follow the proper procedures.

The jury instruction did not imply the trial court judge's attitude regarding the merits of the case. The instruction was not an impermissible comment on the evidence and Miller's conviction should be affirmed.

3. If The Jury Instruction Is Found To Be A Comment On the Evidence It Was Not Prejudicial To The Outcome Of Miller's Case And Therefore It Is Harmless Error.

Even assuming, arguendo, that Jury Instruction 19 is an impermissible comment on the evidence by the trial court judge, it would be harmless because Miller was not prejudiced by the comment. The overwhelming evidence, as testified to by Mr. Cole, Mr. Norris and Miller, was that Miller moved the trailer from its original parking spot and sold it to Mr. Norris after he knew the trailer belonged to Mr. Cole and that Mr. Cole wanted his trailer back. 1RP 30-31, 71-77; 2RP 68, 100-01. This evidence proved, beyond a reasonable doubt that Miller committed theft in the second degree.

IV. CONCLUSION

The trial court did not violate the public trial right or Miller's right to be present during all critical proceedings. The State presented sufficient evidence to sustain the conviction. Finally, the trial court did not impermissibly comment on the evidence. For the reasons argued above, this Court should affirm Miller's convictions.

RESPECTFULLY submitted this 4th day of December, 2012.

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by:_____
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December 04, 2012 - 3:50 PM

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